BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

Docket No. 2017-292-WS

In Re: **Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water and Sewer Services**	)	**REPLY OF CAROLINA WATER SERVICE TO ORS OPPOSITION TO PETITION FOR REHEARING AND RECONSIDERATION**

Carolina Water Service, Inc. ("CWS" or "Company")[1], pursuant to S.C. Code Ann. §58-5-330 and this Commission's Rules of Practice and Procedure, submits this reply memorandum ("Reply") to the Memorandum in Opposition of the Office of Regulatory Staff ("ORS") to the CWS Petition for Rehearing and Reconsideration ("ORS Memorandum"). As explained in this Reply the arguments advanced in the ORS Memorandum should be rejected and the Commission should grant the relief requested in the CWS Petition for Rehearing and Reconsideration ("CWS Petition").

BACKGROUND

This proceeding was initiated when CWS filed an application for a rate increase in November 2017. Following an evidentiary hearing in April 2018, the South Carolina Public Service Commission ("Commission") issued Order No. 2018-345(A) granting a portion of the rate increases sought by CWS. In June 2018, the ORS filed a petition for rehearing or reconsideration asking that the Commission reconsider six specific issues ruled on in Order No. 2018-345(A). In response to the ORS petition for reconsideration, the Commission issued Order No. 2018-494

[1] CWS has recently changed its name to Blue Granite Water Company (See Docket No. 2018-365-WS), but to avoid confusion will continue to use its former name for purposes of this proceeding.

granting rehearing on four of the six issues raised by ORS, including the litigation expense issue arising from *Congaree Riverkeeper v. Carolina Water Service* federal court litigation ("*Riverkeeper*") which is the subject of the CWS Petition. Following the rehearing, the Commission issued Order No. 2018-802. Among other rulings, Order No. 2018-802 ruled on recovery of litigation expenses differently from the ruling on that issue in Order No. 2018-345(A). On February 14, 2019 CWS filed its Petition with this Commission seeking rehearing and reconsideration of the ruling on recovery of litigation expenses. On February 25, 2019 CWS filed a notice of intent to appeal with the South Carolina Supreme Court.

In response to the CWS Petition, the Office of Regulatory Staff ("ORS") filed a motion requesting dismissal of the CWS Petition on the grounds that it was not permitted because it followed a previous order granting rehearing and because the notice of appeal divested the Commission of jurisdiction. On March 7, 2019, the Commission issued Order No. 2019-178 dismissing the CWS Petition on the ground that the notice of appeal divested the Commission of jurisdiction. On March 22, 2019 CWS filed a motion with the Supreme Court asking that the case be remanded to this Commission for reconsideration of the CWS Petition. On May 15, 2019, the Supreme Court issued an order dismissing the CWS notice of appeal, vacating Commission Order No. 2019-178 and directing the Commission to rule on the merits of the CWS Petition. On May 21, 2019 CWS submitted a supplemental memorandum in support of the CWS Petition and to provide the Commission with additional information relevant to the issue presented in its Petition. On June 6, 2019, the ORS filed the ORS Memorandum to which CWS now responds.

ARGUMENT

This Reply will address arguments advanced in the ORS Memorandum: (1) the ORS Memorandum relies almost exclusively on findings from a non-final summary judgment order from a federal court that conflict with undisputed evidence presented in this proceeding in the

hearing on remand; and (2) the ORS Memorandum mischaracterizes the benefits to ratepayers obtained by the settlement CWS entered in the *Riverkeeper* litigation.

1. Assertions in the ORS Memorandum Are Not Supported by the Record in This Proceeding or Applicable Law.

The ORS discussion of the *Riverkeeper* litigation, for which CWS was initially allowed by the Commission to recover related attorney fees and costs, repeatedly misstates or omits facts which demonstrate that CWS made a good faith effort to obtain a connection of the I-20 System to the Town of Lexington ("Town") regional line and that ratepayers did receive a benefit from the Company's defense of itself in the citizen suit.[2]

For example, ORS argues that "[a]fter an 11-year hiatus between 2003 and 2014, CWS management was forced to again seek to connect its I-20 WWTP with the regional system only **after** the Riverkeeper advised CWS that it intended to sue in 2014 (*sic*). CWS management alone made the decision to wait 11 years between 2003 and 2014 before even attempting to comply with its legal obligations under the [Clean Water Act] and the express terms of its NPDES Permit." (**Emphasis** in original, emphasis supplied.) The inaccuracy of the factual assertions made in this statement are apparent on the face of the record in this proceeding – much of it developed in the direct and cross examination of ORS's own witness -- which demonstrates the following:

- Notwithstanding the Town's completion of its regional line in 1999, it entered into a July 2000, enforcement agreement with DHEC which recognized that the Town did not then have the capacity to take or treat the influent flow from the I-20 System and would not have such capacity for the foreseeable future. [Tr. p. 169, ll. 10-14, Hg. Ex. 7 at p. 12.]

[2] As has been previously asserted by CWS, ORS's petition for rehearing in this matter raised only one issue, i.e., whether the attorney fees paid by the Company in the various litigation matters which the Commission allowed in expenses for ratemaking purposes were reasonable under the factors identified by the Supreme Court in the *Jackson v. Speed* and *Glasscock* cases. Accordingly, ORS did not raise in its petition the issue of whether these expenses benefitted ratepayers and, therefore, this cannot be a basis for reconsideration. By addressing ORS's newly raised issue in this Reply, CWS does not waive, but expressly reserves, its position that the matter of benefit to customers from this litigation is not properly before the Commission.

- Upon learning that the expansion of the Cayce regional treatment facility was nearing completion such that Town would have adequate treatment capacity available for the I-20 System influent flow, CWS requested a connection of the I-20 System with the Town's regional line on October 5, 2011, but received no response to that request. [Tr. p 169, ll. 4-7, Hg. Ex. 7 at p. 10.]

- After learning that the expansion of the Cayce treatment facility was completed in the fall of 2012, CWS again requested a connection to the Town's regional line on July 22, 2013. On this occasion, the Town did respond and on July 31, 2013, confirmed that it now had available to it adequate treatment capacity at the Cayce facility, but stated that it lacked pumping capacity in its own facilities to transport the I-20 System flow through the Town's regional line to Cayce for treatment. [Tr. p. 169, ll. 8-12, Hg. Ex. 7 at p. 12.]

- The Congaree Riverkeeper, Inc. ("CRK") did not give its 60-day notice of intent to bring a citizen suit against CWS under the Federal Clean Water Act until November 4, 2013 – several months after CWS had sought and been denied an interconnection by the Town. [Tr. p. 271, ll. 13-17.]

- The Town, even though it owned the regional line to which CWS was obligated to connect, had more effluent limit exceedances recorded in the on-line records of the Environmental Protection Agency during the relevant per period, received multiple permit renewals during the relevant period, but did not connect its own Coventry Woods wastewater treatment facility to that line until October of 2015 – none of which CRK or DHEC took action to address. [Tr. 318, l. 17 – p. 322, l. 14.]

- The Town refused to provide CWS with wholesale service which would have eliminated the Company's discharge from the I-20 System. [Tr. p. 328, l. 22 – p. 329, l.1; p. 333, l.24 – p. 334, l.1.]

- The Town did not make an offer to purchase the I-20 System from CWS until after the District Court issued its original order imposing a $1.5 Million penalty on CWS. [Tr. p. 334, ll. 6- 16.]

Thus, the record **in this proceeding**[3] conclusively demonstrates that (a) the Town did not have the ability to take the influent flow from the I-20 System and arrange for its treatment by

[3] In support of its contention that customers got no benefit and that the litigation costs resulted solely from improper management on the part of CWS, ORS cites to the discussion regarding CWS's efforts to obtain a connection from the Town set out in the original District Court order in the CRK action. ORS Mem. at 3, 5. This, however, fails to address the fact that the District Court vacated the penalties imposed upon CWS for not obtaining the connection and that the matter was ultimately resolved by settlement in which CRK agreed that the settlement was not an admission of liability on the part of CWS. As a matter of law, preliminary rulings in a matter that does not reach final judgment cannot be the basis for collateral estoppel. See *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986).

Cayce between 2003 and 2013 and (b) CWS did attempt to obtain a connection from the Town between 2003 and 2014 and *prior* to CRK's issuance of its 60-day notice of intent to sue in 2013. And these facts testified to by CWS's witness were not only unrefuted by ORS in the surrebuttal testimony of its witness Dawn Hipp, they were also the subject of cross-examination by ORS counsel who did not even attempt to dispute this evidence (Tr. p. 178, l. 23 – p. 180, l.3). Instead of addressing these undisputed facts directly, the ORS Memorandum avoids them by relying almost entirely on a summary judgment order that clearly conflicts with the documented record of CWS's efforts to interconnect the I-20 facility. CWS submits that Commission should review and rely on the testimony and exhibits presented in the hearing in this proceeding to independently decide the issues raised in the CWS Petition. The ORS Memorandum also makes misstatements of law in support of its position that CWS customers did not benefit from the Company's defense against of the *Riverkeeper* litigation. ORS contends that CWS had a "legal obligation" to connect the I-20 System to the Town's regional line arising under the "express terms" of the Company's NPDES Permit. These contentions are both wrong.

As to the latter contention, although the District Court order of March 2017 concluded that CWS had an obligation to connect to the Town's regional line under the permit, it did not find that this was an "express term[]" of the permit. To the contrary, the District Court expressly found that the permit was ambiguous with respect to CWS's obligation to connect and that CWS's interpretation of the permit in that regard was reasonable – a finding that was admitted on cross-examination by ORS witness Strangler. [Tr. p. 306, l. 20 – p. 308, l. 25.]

As to the former contention, the findings of the District Court in its March 2017 order are not binding upon this Commission, which is free to make its own findings of fact and conclusions

of law regarding matters within its jurisdiction. See *Richburg v. Baughman, supra*.[4] However, it is beyond dispute that this Commission is required to follow South Carolina law which demonstrates that CWS's NPDES permit did not require it to connect to the Town's regional facility during the relevant period. For example, the South Carolina Administrative Law Court ("ALC") and the South Carolina Board of Health and Environmental Control ("Board") expressly ruled in 2003 and 2004, respectively, that CWS was not obligated to connect the I-20 System to the Town's regional line even though the line had been completed by 1999. [Hg. Ex. 12, Tr. p. 314, ll. 17-24.] ORS witness Strangler testified that he was aware of, but not familiar with, these rulings of the ALC and the Board. [Tr. p. 309, l.6 – p. 311, l. 4.] However, Strangler testified that he was familiar with the Supreme Court's holding in *City of Columbia v. Board of Health* that a municipal designated management agency ("DMA") under the water quality management plan adopted by Central Midlands Council of Governments, the regional planning agency under 33 U.S.C.A. §1288 ("208 Plan"), bears the burden of offering a wholesale connection to a public utility whose sewer treatment facilities are scheduled for elimination or acquiring that utility's system through purchase or condemnation. [Tr. p. 327 ll. 5-16.] In a related, subsequent appeal, *Midlands Utility v. DHEC*, the Court of Appeals held that the public utility could not be penalized for failing to connect to a regional facility where, as is the case here, the municipal DMA refused to provide a connection – a South Carolina appellate court decision of which ORS witness Strangler professed to be unaware. [Trp. p. 327, l. 22 – p. 328, l. 2.] Notwithstanding that lack of knowledge, it is clear that South Carolina law views CWS's "legal obligation" quite differently than the view which ORS urges this Commission to adopt.

[4] As the Commission is aware, the penalty originally imposed upon BGWC for not having connected the I-20 System to the Town's regional line was vacated by the District Court.

The Commission should reject ORS's contention that "CWS's management fail[ed] to comply with … existing regulatory requirements" and failed to "act in good faith" by not connecting the I-20 System to the Town's regional line "for eleven years" and that the lack of such connection which led to the *Riverkeeper* litigation "rests solely on the shoulders of CWS's management." ORS Mem. at 7. The record before this Commission demonstrates to the contrary and any findings of the District Court which suggest otherwise are irrelevant in the circumstances of this proceeding.

Finally, the contention that customers did not benefit from the Company's defense of the *Riverkeeper* litigation is refuted by the facts which ORS's own witnesses acknowledged at the hearing. Specifically, ORS witness Strangler agreed that CRK stated to the District Court that relief it sought against CWS included a "shutdown" of the I-20 System, notwithstanding its impact on customers. [Tr. p. 337, l. 2- p. 338, l. 20.] On cross-examination, ORS witness Hipp also acknowledged that customers would not have benefitted from the threatened shutdown of the I-20 System. [Tr. p. 448, l.23 – p. 452, l. 6.]

The position of ORS taken in this proceeding can be summarized as follows: as a public utility, CWS is obligated to provide sewer service to its customers, but it provides no benefit to its customers when it defends itself against a plaintiff whose claims seek the termination of that service pursuant to an ambiguous NPDES permit term requiring connection to a regional facility (the specific terms of which have been interpreted by two quasi-judicial tribunals and one appellate tribunal in South Carolina as not requiring connection to a regional facility); further, it must bear the consequences of the refusal of a municipal Designated Management Agency to comply with clear South Carolina law with respect to its obligations under the 208 Plan to make a connection available. The Commission should reject this view as unsupported by the record in this proceeding and the applicable law.

And in this latter regard, should there be any doubt about whether that segment of the public comprising CWS's former I-20 customers have benefitted from that which ORS claims CWS was obligated to obtain – a connection which has resulted in the Town becoming their sewer service provider – the Commission only need take notice of the current rates imposed upon these former CWS customers (https://www.lexsc.com/DocumentCenter/View/835/2019-Water-and-Sewer-Rates) which are already higher than those CWS is entitled to charge and which are subject to no regulatory oversight by this Commission. *See* S.C. Code Ann. §58-5-30. To the contrary, these former customers of CWS are now left to the ratemaking actions of the Town's council, for which none of these customers have the ability to vote, and which may set whatever rates, terms and conditions of service it may decide. *See Sloan v. City of Conway*, 347 S.C. 324, 330, 555 S.E.2d 684, 686 (2001) (holding that a municipality (1) has no obligation to furnish utility service to non-residents, (2) that, should it do so, it is not obligated to charge "reasonable rates," and (3) "actually has 'an obligation to sell its surplus [service] *for the sole benefit of the city at the highest price obtainable*.'"). These harms are precisely the type that this Commission found to be contrary to the public interest in 1996 and 2002 when it rejected terms offered by the Town for the purchase of, and then wholesale service to, the CWS I-20 System. *See* Tr. p. 169, ll. 7-9, Order No. 2003-10, Docket No. 2002-147-S, January 7, 2003, Tr. p. 317.

2. The ORS Memorandum Mischaracterizes the Ratepayer Benefits Obtained by the Settlement of the Riverkeeper Litigation.

As attachments to its Supplemental Memorandum supporting its petition for rehearing and reconsideration, CWS provided the Commission with a copy of the Settlement Agreement from the *Riverkeeper* litigation and the order of the District Judge approving the settlement. CWS argued that the settlement provided important benefits to ratepayers because of the provisions in the Settlement Agreement that enhanced the ability of CWS to negotiate successful resolutions in two situations (the closure of the Watergate and Friarsgate treatment facilities) that are similar to

the difficult issues confronted in the *Riverkeeper* litigation. See CWS Supplemental Memorandum at pp. 3-4. The ORS Memorandum does not mention this aspect of the Settlement Agreement and does not attempt to explain why it is not beneficial to ratepayers for CWS to have an opportunity to negotiate satisfactory resolutions regarding the closure of the Watergate and Friarsgate facilities. Instead the ORS Memorandum addresses the Settlement Agreement solely by rehashing its argument on the *Riverkeeper* litigation. This approach by the ORS mischaracterizes the Settlement Agreement and should be taken by the Commission as an admission by the ORS that the Settlement Agreement did provide substantial ratepayer benefits.

CONCLUSION

CWS continues to believe that the Commission should rehear and reconsider Order No. 2018-802 for the reasons stated in the CWS Petition. The ORS Memorandum provides no legitimate basis for a rejection of the CWS Petition. The defense by CWS of the *Riverkeeper* litigation was reasonable and prudent, and its expenses in that litigation are fully recoverable in rates following well established regulatory principles. The Settlement Agreement now finalizes the *Riverkeeper* litigation, and it provides significant benefits to ratepayers that should be considered by the Commission as it decides the issues presented by the CWS Petition.

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